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10/572,719	03/21/2006	Ronald Vermeer	2903925-265000	4678
84331 7590 02/07/2011 Baker Donelson Bearman, Caldwell & Berkowitz, PC 920 Massachusetts Ave, NW Suite 900 Washington, DC 20001				
EXAMINER FISHER, ABIGAIL L				
ART UNIT		PAPER NUMBER		
1616				
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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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### Office Action Summary

**Application No.**

10/572,719

**Applicant(s)**

VERMEER, RONALD

**Examiner**

ABIGAIL FISHER

**Art Unit**

1616

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 01 December 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 11, 14-17, 22 and 25-36 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 11, 14-17, 22 and 25-36 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-945)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

Receipt of Amendments/Remarks filed on December 1 2010 is acknowledged. Claims 1-10, 12-13, 18-21 and 23-24 were/stand cancelled. Claim 11 was amended. Claims 25-36 were added. Claims **11, 14-17, 22 and 25-36** are pending.

### **Examiner's Note**

The active compound "metaminostrobin" appears to be spelt incorrectly. The art recognizes the spelling of "metominostrobin". This is also the spelling that is present in the current priority document DE 10343872.6. Therefore for future search purposes the examiner recommends changing the spelling of metaminostrobin to metominostrobin (In claims and specification).

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 16 recites the limitation "fluoxastrobin" in line 2. There is insufficient antecedent basis for this limitation in the claim. Specifically, claim 16 depends from claim 11 where there are four (a) compounds claimed and fluoxastrobin is not one of them.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Applicant Claims
2. Determining the scope and contents of the prior art.
3. Ascertaining the differences between the prior art and the claims at issue, and resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Modified Rejection Based on amendments in the reply filed on December 1 2010**

**Claims 11, 14-15, 17, 22 and 26-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. (US PG PUB No. 20010051175, cited in the Office action mailed on 10/01/09) in view of Grayson et al. (Pestic. Sci. 1995, cited in the Office action mailed on 10/15/10) and Aven (EP 1023832, cited in the Office action mailed on 10/1/09) as evidenced by Schlatter (USPG PUB No. 20020040044).**

**Applicant Claims**

The instant application claims a suspension concentrate consisting of between 10 and 40% by weight, based on the suspension concentrate, of at least one active compound that is solid at room temperature selected from the group consisting of prothioconazole, tebuconazole, metaminostrobin and trifloxystrobin; between 5 and 20% by weight, based on the suspension concentrate, of at least one alkanolethoxylate of formula I; and between 3 and 8% by weight, based on the

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suspension concentrate of at least one dispersant mixture; between 40 and 65% by weight, based on the suspension concentrate of water; and between 0 and 15% by weight, based on the suspension concentrate of one or more additives. The dispersants are selected from the group consisting of the polymers of methyl 2-methyl-2-propenoate and  $\alpha$ -(2-methyl-1-oxo-2-propenyl)- $\omega$ -methoxy-poly(oxy-1,2-ethanediyl) (such as Atlox 4913), tristyrilphenoethoxylates (such as Sopropher FL), and propylene oxide/ethylene oxide block copolymers having molecular weights between 8000 and 10,000 (such as Pluronic PE 10500).

**Determination of the Scope and Content of the Prior Art  
(MPEP §2141.01)**

Strom et al. is directed to aqueous dispersions of agricultural chemicals. Examples of active agents that can be utilized include insecticides such as triazoles (paragraph 0012) and fungicides such as azoles such as hexaconazole and strobilurins such as azoxystrobin (paragraph 00130). The surface active agent included may be anionic, cationic or nonionic, or combinations of cationic and nonionic or anionic and nonionic. A stabilizing amount of the surfactant is used, preferably not less than about 1% and not more than 30% by weight based on the total weight of the water, pesticide and surfactant (paragraph 0014). Specific examples of commercially available surface active agents include Atlox 4991 and 4913 surfactants (nonionic), Pluronic P104 (nonionic), and Soprophor FL surfactant (anionic). The pesticide is in an amount from about 1 to about 60% (claim 1). Exemplified pesticides include epoxiconazole (example 7).

**Ascertainment of the Difference Between Scope the Prior Art and the Claims**

***(MPEP §2141.012)***

While Strom et al. teach surfactant combinations of an anionic and nonionic surfactant, Strom et al. do not exemplify utilizing Atlox 4913 in combination with Soprophor FL.

Strom et al. do not teach the incorporation of an alkanolethoxylate. However, this deficiency is cured by Grayson et al.

Grayson et al. is directed to the effect of adjuvants on the performance of the fungicide metconazole. It is taught that suspension concentrates which are generally less active saw around a 35-fold enhancement with the addition of Genapol C12/C14 alcohol ethoxylates (abstract). Table 2 shows the efficacy of the addition of the Genapol adjuvants to suspension concentrates. Genapol adjuvants utilized are C050, C080, C100 and C200 (page 155, section 2.3). It is taught that Genapol adjuvants possess the capability of drastically improving the performance of particulate formulations of agrochemicals so that their activities exceed those of solution formulations without adjuvants and approach the activities of solution formulations with adjuvants (page 158, section 3, right column, first paragraph).

While Strom et al. teach that triazoles can be incorporated, Strom et al. do not teach the incorporation of tebuconazole, metaminostrobin or tebuconazole and trifloxystrobin. While Strom et al. teach the use of pluronic surfactants, Strom et al. does not teach the use of Pluronic PE 10500. However, these deficiencies are cured by Aven.

Aven is directed to aqueous suspension concentrates. The compositions comprise 50 to 400 g/L of a crop protection compound, 50 to 500 g/L of an adjuvant and at least one surfactant selected from the group consisting of (c1) 5 to 75 g/L of one or more non-ionic dispersant and (c2) 10 to 100 g/L of one or more anionic dispersants (abstract). Fungicides taught include azoxystrobin, epoxiconazole, metconazole, SSF-126 and trifloxystrobin (paragraph 0017). Surfactants/dispersants taught include non-ionic dispersants such as polyethyleneoxide-polypropyleneoxide block copolymers (paragraph 0042). The most preferred are the Pluronic type block copolymers such as Pluronic PE 10500 (paragraph 0043). Anionic dispersants taught include Soprophor FL (table page 10). Both Pluronic PE 10500 and Soprophor FL are exemplified. It is taught that appropriate relative amount of active ingredient and adjuvants lie between 1:0.5 and 1:100. In general, the pesticidal efficacy can be enhanced to a higher degree by the addition of larger amount of adjuvant (b) (paragraph 0047). The compositions are produced so as to obtain a stable non-sedimenting flowable product and usually contain 0 to 15% w/v antifreeze agent, 0 to 10% of suspending agents, 0 to 2.5% w/v preservatives and 0 to 10% w/v of other additives such as defoamers, corrosion inhibitors, etc. and an organic liquid in which the active ingredient is substantially insoluble (paragraph 0054). Anti-foaming agents are silicone oils such as polysalkylsiloxanes (paragraph 0055). The compositions also comprise structuring agents (thickeners) (paragraph 0052). Exemplified anti-freeze agents include propylene glycol (example 7).

***Finding of Prima Facie Obviousness Rationale and Motivation  
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven and Grayson et al. and utilize an ethoxylate alcohol as a surfactant adjuvant in order to enhance foliar uptake. One of ordinary skill in the art would have been motivated to add an ethoxylated alcohol as Grayson et al. teach that these adjuvants when added to suspension concentrates drastically enhance their performance. Therefore, one of ordinary skill in the art would have been motivated to add ethoxylate alcohols such as the Genapol adjuvants to the formulation of Strom et al. to enhance absorbance of the pesticides based on the teachings of Grayson et al. There is a reasonable expectation that the effect seen with metconazole as taught by Grayson et al. would reasonably apply to other azoles such as tebuconazole. One of ordinary skill in the art would have a reasonable expectation of success as both metconazole and tebuconazole are azole fungicides (both species of the same genus) and therefore would functionally be expected to behave similarly.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven and Grayson et al. and utilize an anionic and nonionic surfactant in combination together such as Atlox 4913 and Soprophor FL. One of ordinary skill in the art would have been motivated to utilize a combination of an anionic and nonionic surfactant as this is one specific combination taught as being suitable. Atlox 4913 is a specifically taught commercially available nonionic surfactant and Soprophor FL is a specifically taught commercially available anionic surfactant. Therefore, it would have been obvious to one of ordinary skill in the



art to utilize these specifically taught surfactants in a specifically taught surfactant combination.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven and Grayson et al. and utilize Pluronic PE 10500 in combination with Atlox 4913 or Soprophor FL. One of ordinary skill in the art would have been motivated to utilize this combination as Strom et al. suggest utilizing Pluronic surfactants and Aven teach that the pesticidal efficacy can be enhanced to a higher degree by the addition of larger amount of adjuvant. Therefore, it would have been obvious to one of ordinary skill in the art to utilize Pluronic PE 10500 in combination with Atlox 4913 or Soprophor FL in order to provide a larger amount of adjuvant which would be expected to enhance pesticidal efficacy as taught by Aven.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven and Grayson et al. and utilize tebuconazole, metaminostrobin and trifloxystrobin in the invention of Strom et al. One of ordinary skill in the art would have been motivated to add these active compounds as Strom et al. teach that triazoles can be included and the taught triazoles (epoxiconazole and hexaconazole) have the same function (i.e. fungicide) as tebuconazole, metaminostrobin and trifloxystrobin as taught by Aven. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their

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having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven and Grayson et al. and utilize conventional additives such as preservatives, antifreeze agent, thickener (structuring agent) and defoamer. One of ordinary skill in the art would have been motivated to utilize these ingredients as they are conventional for suspension concentrates as taught by Aven. Therefore, all of the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions and the combination would have yielded predictable results to one of ordinary skill in the art at the time of the invention. **Note: MPEP 2141 [R-6] *KSR International CO. v. Teleflex Inc.* 82 USPQ 2d 1385 (Supreme Court 2007).**

Regarding the claimed amount of active compound, water and dispersant mixture, Strom et al. teach an amount that overlaps that instantly claimed. In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5].**

Regarding the claimed amount of the alcohol ethoxylate, the amount of an ethoxylate in a composition is clearly a result effective parameter that a person of ordinary skill in the art would routinely optimize. Optimization of parameters is a routine practice that would be obvious for a person of ordinary skill in the art to employ and reasonably would expect success. It would have been customary for an artisan of

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ordinary skill to determine the optimal amount of ethoxylate to add in order to best achieve the desired absorbance. It would have been obvious to one of ordinary skill in the art at the time of the invention to engage in routine experimentation to determine optimal or workable ranges that produce expected results. Where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation. *In re Aller*, 220 F. 2d 454, 105 USPQ 233 (CCPA 1955).

Regarding the claimed length of the alkanolethoxylate, Grayson et al. teach an amount that overlaps that instantly claimed with specific examples falling within the instant claimed range. In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a *prima facie* case of obviousness exists. **See MPEP 2144.05 [R-5].**

Regarding the claimed metominostrobin, as evidenced by Schlatter SSF-126 is metominostrobin (paragraph 0030).

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

**Claims 11 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. in view of Grayson et al. and in further view of Mauler-Machnik et**

**al. (US Patent No. 6559136, cited in the Office action mailed on 10/01/09) and Heinemann et al. (WO 9727189, cited in the Office action mailed on 10/01/09).**

### **Applicant Claims**

The instant application claims the active compounds are prothioconazole and fluoxastrobin.

### **Determination of the Scope and Content of the Prior Art (MPEP §2141.01)**

The teachings of Strom et al. and Grayson et al. are set forth above. Strom et al. is directed to aqueous dispersion comprising active compounds which include triazoles such as epoxiconazole and hexaconazole. The active ingredients are combined with surfactant combinations and water to form pesticidal compositions. Grayson et al. teach that the addition of adjuvants such as ethoxylated alcohols (Genapol) enhance absorption of metconazole.

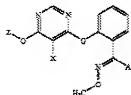
### **Ascertainment of the Difference Between Scope the Prior Art and the Claims (MPEP §2141.012)**

Strom et al. do not specify that the fungicides are fluoxastrobin and prothioconazole can be added. However, this deficiency is cured by Heinemann et al. and Mauler-Machnik et al.

Mauler-Machnik et al. found that utilizing fungicide compounds of general formula I in combination with other fungicides such as tebuconazole (3), epoxiconazole (10), metconazole (11), 2-(1-chloro-cyclopropyl)-1-(2-chlorophenyl)-3(5-mercapto-1,2,4-triazol-1-yl)-propan-2-ol (aka prothioconazole) (69) and trifloxystrobin (75) found in

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columns 1 and 2 and claim 1 have very good fungicidal properties (column 2, lines 60-62). Compounds of Formula I have the following structure:



in which

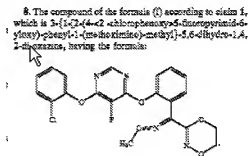
Z represents optionally substituted phenyl,

X represents halogen and

A represents heterocyclyl  $-\text{COOCH}_3$  or  $-\text{CO}-\text{NH}-\text{CH}_3$  and

It is taught that the compounds of the formula I are known for example in WO 9727189 (column 3, lines 34-35).

Heinemann et al. (wherein US Patent No. 6103717 is serving as the English Language Equivalent) teach the compounds of formula 1 from Mauler-Machnik et al. One specific compound claimed is:



This compound is fluoxastrobin.

***Finding of Prima Facie Obviousness Rationale and Motivation  
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Grayson et al., Mauler-Machnik et al. and Heinemann et al. and utilize fluoxastrobin and prothioconazole in the invention of Strom et al. One of ordinary skill in the art would have been motivated to utilize fluoxastrobin and prothioconazole as Mauler-Machnik et al. teach utilizing generic compounds which encompass fluoxastrobin in combination with epoxiconazole and prothioconazole. Since Mauler-Machnik et al. teach compounds of their formula I can be found in Heinemann et al., one of ordinary skill in the art would look to this patent for specific compounds of formula I. One specific compound taught and claimed is fluoxastrobin. Therefore, Mauler-Machnik et al. teach utilizing fluoxastrobin in combination with epoxiconazole and prothioconazole and their combination would have been obvious to one of ordinary skill in the art. As a general principle it is *prima facie* obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose, the idea of combining them flows logically from their having been individually taught in the prior art. See *In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) **MPEP 2144.06**.

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Grayson et al., Mauler-Machnik et al. and Heinemann et al. and utilize an ethoxylate alcohol as a surfactant adjuvant in order to enhance foliar uptake. One of ordinary skill in the art would have been motivated to add an ethoxylated alcohol as Grayson et al. teach that these

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adjuvants when added to suspension concentrates drastically enhance their performance. Therefore, one of ordinary skill in the art would have been motivated to add ethoxylate alcohols such as the Genapol adjuvants to the formulation of Strom et al. to enhance absorbance of the pesticides based on the teachings of Grayson et al. There is a reasonable expectation that the effect seen with metconazole as taught by Grayson et al. would reasonably apply to other azoles such as tebuconazole. One of ordinary skill in the art would have a reasonable expectation success as both metconazole and tebuconazole are azole fungicides (both species of the same genus) and therefore would functionally be expected to behave similarly.

Absent any evidence to the contrary, and based upon the teachings of the prior art, there would have been a reasonable expectation of success in practicing the instantly claimed invention. Therefore, the invention as a whole would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made.

**New Rejections Necessitated by the Amendments filed December 1 2010**

**Claim 35 is rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. in view of Grayson et al. and Aven as evidenced by Schlatter and in further view of Pullen (USPGPUB No. 20030035852).**

### **Applicant Claims**

The instant application claims the composition comprises butylated hydroxytoluene.

### **Determination of the Scope and Content of the Prior Art (MPEP §2141.01)**

The teachings of Strom et al., Grayson et al. and Aven are set forth above. Strom et al. is directed to aqueous dispersion comprising active compounds which include triazoles such as epoxiconazole and hexaconazole. The active ingredients are combined with surfactant combinations and water to form pesticidal compositions. Grayson et al. teach that the addition of adjuvants such as ethoxylated alcohols (Genapol) enhance absorption of metconazole. Aven is directed to suspension concentrates comprising triazoles and strobins. The compositions comprise conventional ingredients such as preservatives.

### **Ascertainment of the Difference Between Scope the Prior Art and the Claims (MPEP §2141.012)**

Neither Strom et al. or Aven teach utilizing butylated hydroxytoluene as a preservative. However, this deficiency is cured by Pullen.

Pullen is directed to insecticides and fungicides. Preservatives taught include butylated hydroxytoluene (paragraph 0034).

### ***Finding of Prima Facie Obviousness Rationale and Motivation (MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven, Grayson et al. and Pullen and utilize butylated hydroxytoluene. It would have been obvious to one of



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ordinary skill in the art to try preservatives known to be utilized with fungicides and herbicides as a person with ordinary skill has good reason to pursue known options within his or her technical grasp. **Note: MPEP 2141 [R-6] *KSR International CO. v. Teleflex Inc.*** 82 USPQ 2d 1385 (Supreme Court 2007).

**Claim 36 is rejected under 35 U.S.C. 103(a) as being unpatentable over Strom et al. in view of Grayson et al. and Aven and in further view of Schlatter.**

#### **Applicant Claims**

The instant application claims the composition further comprises a vegetable oil.

#### **Determination of the Scope and Content of the Prior Art (MPEP §2141.01)**

The teachings of Strom et al., Grayson et al. and Aven are set forth above. Strom et al. is directed to aqueous dispersion comprising active compounds which include triazoles such as epoxiconazole and hexaconazole. The active ingredients are combined with surfactant combinations and water to form pesticidal compositions. Grayson et al. teach that the addition of adjuvants such as ethoxylated alcohols (Genapol) enhance absorption of metconazole. Aven is directed to suspension concentrates comprising triazoles and strobins. The compositions comprise conventional ingredients solvents.

#### **Ascertainment of the Difference Between Scope the Prior Art and the Claims (MPEP §2141.012)**

Neither Strom et al. or Aven teach utilizing a vegetable oil as a solvent in the suspension concentrates. However, this deficiency is cured by Schlatter.

Schlatter is directed to pesticidal composition in the form of suspension concentrates comprising a triazole fungicide. It is taught that water immiscible solvents such as plant oils like soybean oil (paragraph 0046).

***Finding of Prima Facie Obviousness Rationale and Motivation  
(MPEP §2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the instant invention to combine the teachings of Strom et al., Aven, Grayson et al. and Schlatter and utilize plant oils such as soybean oil. One of ordinary skill in the art would have been motivated to add an oil in order to aid in the solubilization or suspension of components of the suspension concentrate as taught by Schlatter.

***Response to Arguments***

Applicants argue that (1) the references do more than merely teach the individual components are known. There is no reason to select the active compound(s) as claimed. Applicants argue that (2) there is no reason to select the penetration enhancer. Applicants argue that (3) there is no reason to select the instantly claimed dispersant mixture. Applicants argue that (4) admittedly prothioconazole and fluoxastrobin are known compounds however their compatibility with the claimed penetration enhancers and dispersant mixtures would not have been obvious just because they are known.

Applicants' arguments filed December 1 2010 have been fully considered but they are not persuasive.

Regarding applicants' first and fourth argument, Strom et al. suggest classes of compounds such as azoles and strobilurins. Therefore, one of ordinary skill in the art would have been motivated to select compounds from these classes. Aven teaches that the instantly claimed active compounds are well known, commercially available and utilized for the fungicidal activity as does Mauler and Heinemann. Therefore, one of ordinary skill in the art would have been motivated to select any compound(s) from the list taught by Aven Mauler and Heinemann. Applicants have not demonstrated the unobviousness of the instantly claimed compounds. Therefore, since Strom et al. suggests the class of fungicides, the examiner maintains that absent a display of unexpected results selection of any compound(s) from these classes would have been obvious.

Regarding applicants' second argument, the examiner disagrees. Grayson et al. teach that these adjuvants when added to suspension concentrates drastically enhance their performance. Therefore, one of ordinary skill in the art would have been motivated to add ethoxylate alcohols such as the Genapol adjuvants to the formulation of Strom et al. to enhance absorbance of the pesticides based on the teachings of Grayson et al. This provides to motivation to select this compound and add it to the composition of Strom et al. Applicants argue that metconazole, prothioconazole and tebuconazole are structurally different therefore it would not have been obvious. The fungicides metconazole, tebuconazole and prothioconazole all possess the same core and

therefore would be expected to be effected similarly by the inclusion of the Genapol ethoxylates. Therefore, a *prima facie* case of obviousness has been established. In order to overcome the rejection, applicant would have to demonstrate why one of ordinary skill in the art would not expect the Genapol ethoxylates to behave similarly with other azoles of the genus or the other specifically claimed azoles. Applicant argues that Grayson determines that metconazole works best with alcohol ethoxylates with a lower ethylene oxide content. Applicants do not point out where Grayson teaches this and the examiner's reading of Grayson it is specifically stated that "genapols C050 and C080 were marginally, though not with statistical significance, superior to Genapols C100 and C200" (page 159, left column). While the lower ethylene oxide content may be slightly better they are not better with any statistical significance therefore one of ordinary skill in the art would expect them to all behave relatively the same. Applicants argue that Grayson does not teach the claimed amount of penetration enhancer. While the exact amount of the penetration enhancer is not disclosed by Grayson, it is generally noted that differences in amounts do not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). Given that applicant did not point out the criticality of the concentration of penetration enhancer of the invention, it is concluded that the normal desire of scientists or artisans

to improve upon what is already generally known would provide the motivation to determine the optimal amount of penetration enhancer.

Regarding applicants' third argument, while Strom et al. does not exemplify the claimed combination, the rejection is made under 103 and does not need to exemplify all embodiments, only suggest. "Disclosed examples and preferred embodiments do not constitute a teaching away from the broader disclosure or non-preferred embodiment." *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). Strom et al. suggest utilizing a combination of dispersants, specifically nonionic and anionic. Since this combination is suggested by Strom et al., the examiner maintains it would have been obvious to one of ordinary skill in the art to choose a nonionic surfactant listed by Strom et al. (especially those commercially available) with a specifically taught anionic surfactant. Therefore, while not exemplified the combination is clearly suggested.

Therefore, the rejection is maintained since applicant has not provided any persuasive arguments to overcome the rejection.

### ***Conclusion***

No claims are allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ABIGAIL FISHER whose telephone number is (571)270-3502. The examiner can normally be reached on M-Th 9am-6pm EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Abigail Fisher  
Examiner  
Art Unit 1616

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Primary Examiner, Art Unit 1616